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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-147501-001 DT 04/22/2013

CLERK OF THE COURT
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Deputy

STATE OF ARIZONA ANDREA L KEVER

v.

JAMES R WITTEKIND (001) JAMES DAVID SMITH

ARROWHEAD JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR 2011–147501.

Defendant-Appellant James R. Wittekind (Defendant) was convicted in the Arrowhead Justice Court of driving under the influence. Defendant contends the trial court erred in denying his Motion To Suppress, which alleged the officer did not have reasonable suspicion to stop his vehicle. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On September 13, 2011, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2). Prior to trial, Defendant filed a Motion To Suppress alleging the officer did not have reasonable suspicion to stop his vehicle.

At the hearing on Defendant's motion, Officer Derek Smith testified he was on duty on September 13, 2011, driving north on the 101 Freeway. (R.T. of May 21, 2012, at 5.) He was in an area where there was construction in progress, and the posted speed limit was 55 miles per hour. (*Id*. at 9–11.) At Thunderbird Road, he saw a vehicle that appeared to be traveling over the speed limit, and after pacing the vehicle for about ½ mile, determine it was traveling at 65 miles per hour. (*Id*. at 6–9, 13–14.) The vehicle drifted from one side of its lane to the other, with the tires being on top of the lane lines, so based on that and the vehicle's speed, Officer Smith stopped the vehicle. (*Id*. at 8.) He identified Defendant as the driver of the vehicle. (*Id*. at 12–13.)

Officer Smith said the reason he stopped the vehicle was (1) its speed and (2) its weaving in its lane. (*Id*. at 10.) He said the weaving in the lane was not a citable offense but it was part of his suspicion that the driver was impaired. (R.T. of May 21, 2012, at 10–11, 14.) He said the reason why the posted speed limit was 55 miles per hour was the freeway was under construction at that time. (*Id*. at 11.)

After Officer Smith testified, Defendant testified and acknowledged going 65 miles per hour. (R.T. of May 21, 2012, at 15, 17.) He contended, however, 65 miles per hour was the speed limit on that portion of the freeway, unless he had misread the sign. (*Id*. at 17.) He said he contacted the Arizona Department of Transportation and received information that the posted speed limit was 65 miles per hour. (*Id*. at 21.)

After hearing the testimony and the arguments of counsel, the trial court ruled the State had met its burden and denied Defendant's Motion To Suppress. (R.T. of May 21, 2012, at 28.) The trial court later issued the following ruling:

> The defense motion to suppress the evidence was denied during the hearing based on the evidence and testimony provided during the hearing. The court finds that the state met their burden of proof and that reason for the stop (speed) was valid.

(Minute Entry of May 21, 2012.) On June 25, 2012, the parties agreed to submit the matter on the police reports, which showed Defendant's BAC tested at 0.137 and 0.140. Based on the material submitted, the trial court found Defendant guilty of both charges, and then imposed sentence. On July 2, 2012, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION IN FINDING THE OFFICER HAD REASONABLE SUSPICION TO STOP DEFENDANT'S VEHICLE.

Defendant contends the trial court abused its discretion in finding the officer had reasonable suspicion to stop his vehicle. In reviewing a trial court's ruling on a motion to suppress, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody,* 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez,* 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010).

A police officer has reasonable suspicion to detain a person if there are articulable facts for the officer to suspect a person is involved in criminal activity or the commission of a traffic offense. *State v. Lawson,* 144 Ariz. 547, 551, 698 P.2d 1266, 1270 (1985) The Arizona statutes provide that a peace officer may stop and detain a person as is reasonably necessary to investigate an ***actual*** or ***suspected*** violation of any traffic law committed in the officer's presence. A.R.S. § 28–1594; A.R.S. § 13–3883(B). The Arizona Court of Appeals has held a traffic violation provides sufficient grounds to stop a vehicle. *State v. Orendain,* 185 Ariz. 348, 352, 916 P.2d 1064, 1068 (Ct. App. 1996). As stated by the Arizona Court of Appeals:

> It is uncontestable that traveling at any speed over the posted speed limit is a traffic offense and a trooper is justified in stopping a vehicle for the offense.

State v. Acosta, 166 Ariz. 254, 257, 801 P.2d 489, 492 (Ct. App. 1990), *quoting United States v. Garcia,* 897 F.2d 1413, 1419 (7th Cir. 1990). Because it appeared that Defendant was committing a traffic violation, Officer Smith had the legal authority to stop Defendant's vehicle.

As noted in the Minute Entry cited above, the trial court found Defendant's speed gave Officer Smith reasonable suspicion to stop Defendant's vehicle. An appellate court is obliged, however, to affirm the trial court when any reasonable view of the facts and law might support the judgment of the trial court, even when the trial court has reached the right result for a different reason. *State v. Canez,* 202 Ariz. 133, 42 P.3d 564, ¶ 51 (2002); *State v. LaGrand,* 153 Ariz. 21, 29, 734 P.2d 563, 571 (1987); *City of Phoenix v. Geyler,* 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985); *State v. Perez,* 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984); *State v. Chavez,* 225 Ariz. 442, 239 P.3d 761, ¶ 5 (Ct. App. 2010); *State v. Rumsey,* 225 Ariz. 374, 238 P.3d 642, ¶ 4 (Ct. App. 2010); *State v. Childress,* 222 Ariz. 334, 214 P.3d 422, ¶ 9 (Ct. App. 2009); *State v. Waicelunas,* 138 Ariz. 16, 20, 672 P.2d 968, 972 (Ct. App. 1983). In *State v. Superior Court (Blake),* 149 Ariz. 269, 718 P.2d 171 (1986), the officer "observed the vehicle meandering within its lane, and who therefore suspected Blake of driving under the influence of alcohol." 149 Ariz. at 271, 718 P.2d at 173. The Arizona Supreme Court held as follows:

> The fourth amendment to the United States Constitution guarantees the right to be secure against unreasonable search and seizure. This guarantee requires arrests to be based on probable cause and permits limited investigatory stops based only on an articulable reasonable suspicion of criminal activity. Such stops are permitted although they constitute seizures under the fourth amendment. Officer Hohn testified that he stopped Blake because Blake's car had been weaving in its lane, and he suspected the driver to be under the influence of alcohol. We find that Blake's weaving was a specific and articulable fact which justified an investigative stop.

149 Ariz. at 273, 718 P.2d at 175 (citations omitted).

Here Officer Smith testified Defendant's vehicle was weaving within the lane line, and this caused him to suspect Defendant was impaired. (R.T. of May 21, 2012, at 10.) This Court finds Defendant's weaving was a specific and articulable fact that justified an investigative stop.

Defendant contended "it was a 65 mile per hour zone to the best of [his] recollection," "Unless I misread." (R.T. of May 21, 2012, at 17.) He further testified he had been told by someone at the Arizona Department of Transportation that the speed limit in that area was 65 miles per hour. Because Defendant presented only a hearsay statement and thus did produce live witness testimony, the trial court was unable to determine (1) whether 65 miles per hour was the usual posted speed limit in that area, (2) whether there was construction in that area at the time of Defendant's arrest, and (3) if there was construction in that area, whether the posted speed limit was 55 miles per hour because of the construction.

Officer Smith testified, however, there was construction in progress at that time, and the posted speed limit was 55 miles per hour. (R.T. of May 21, 2012, at 9–11.) This presented a credibility question for the trial court to resolve. In addressing the role of an appellate court in reviewing conflicting evidence and testimony, the Arizona Supreme Court has said the following:

> Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers.

State v. Chapple, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). Because this issue involves "an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge" rather than a "question . . . of law or logic," it is not appropriate for this Court to "substitute [its] judgment for that of the trial judge."

Defendant appears to be arguing there was no traffic violation here because driving over the posted speed limit is only prima facie evidence that the speed is too great and therefore unreasonable, and the circumstances may have been such that a speed of 65 miles per hour at that location was reasonable and prudent. On that point, the Arizona Court of Appeals has said the following:

> The statutory provisions that establish or permit the establishment of prima facie safe speed limits are rules of evidence and not rules of substantive law. They raise rebuttable presumptions, which may be overcome by evidence. Driving over the posted speed limit merely creates a presumptive violation of the basic speed law, i.e., the legislature has expressed its intent that speeds in excess of the prima facie limits be considered evidence of speeds greater than are prudent and reasonable and that such driving upon a public highway, at such speed, endangers the life, limb or property of another.

State v. Rich, 115 Ariz. 119, 121, 563 P.2d 918, 920 (Ct. App. 1977) (citations omitted). Defendant is correct that a court of law could have ultimately concluded his speed of 65 miles per hour was reasonable and prudent. This would not, however, have negated Officer Smith's statutory right to stop and detain Defendant to investigate a ***suspected*** violation of the traffic laws. As stated by the Arizona Supreme Court:

> Moreover, when the police make an arrest based upon probable cause, it is not material that the person arrested may turn out to be innocent, and the arresting officer is not required to conduct a trial before determining whether or not to make the arrest.

Cullison v. City of Peoria, 120 Ariz. 165, 168, 584 P.2d 1156, 1159 (1978). As explained by the United States Supreme Court, this is because the level for reasonable suspicion for a stop is less than the level for probable cause for an arrest, and is considerably less than proof of wrongdoing by a preponderance of the evidence for a civil violation or beyond a reasonable doubt for a criminal conviction:

> Although an officer's reliance on a mere "hunch" is insufficient to justify [an investigatory] stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.

United States v. Arvizu, 534 U.S. 266, 274 (2002) (citations omitted).

> The officer, of course, must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.' " The Fourth Amendment requires "some minimal level of objective justification" for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence.

United States v. Sololow, 490 U.S. 1, 7 (1989) (citations omitted); *accord, Illinois v. Wardlaw,* 528 U.S. 119, 123 (2000). Thus, an ultimate conclusion that a speed of 65 miles per hour was reasonable and prudent would not have negated Officer Smith's reasonable suspicion that Defendant was violating the traffic law.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly denied Defendant's Motion To Suppress.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Arrowhead Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Arrowhead Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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